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No. 80-1496

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

UNDERWRITERS NATIONAL ASSURANCE COMPANY,
Petitioner,

vs.

NORTH CAROLINA LIFE AND ACCIDENT AND HEALTH INSURANCE GUARANTY ASSOCIATION, JOHN RANDOLPH INGRAM, COMMISSIONER OF INSURANCE OF THE STATE OF NORTH CAROLINA, AND HARLAN E. BOYLES, TREASURER OF THE STATE OF NORTH CAROLINA,
Respondents.

ON WRIT OF CERTIORARI TO THE NORTH CAROLINA COURT OF APPEALS

BRIEF FOR THE PETITIONER

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QUESTIONS PRESENTED

The North Carolina courts held that an Indiana insurance company's deposit in North Carolina could be reached to satisfy pre-rehabilitation obligations of the insurer, notwithstanding the prior judgment of an Indiana court adopting a plan of rehabilitation that compromised those obligations. The following questions are presented:

Was the 1976 Final Judgment of the Indiana Rehabilitation Court entitled to full faith and credit so as to bind all policyholders and the North Carolina Life and Accident and Health Insurance Guaranty Association ("NCGA") to the Plan of Rehabilitation for Underwriters National Assurance Company ("UNAC")?

In any event, did the 1978 Order of the Indiana Rehabilitation Court preclude any attack by the NCGA on the Plan?

If the Plan is binding as among UNAC, its policyholders, and the NCGA, can the North Carolina officials nonetheless upset it?

PARTIES BELOW

The caption of the case in this Court contains the names of all parties to the proceeding in the North Carolina state courts.

The petitioner, UNAC, an Indiana insurance company, currently has no parent companies, subsidiaries or affiliates. However, prior to UNAC's rehabilitation in 1977 when its stock was placed in a voting trust, all of UNAC's stock was owned by UNAC International Corporation, an Indiana general business corporation.

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OPINIONS BELOW

The December 4, 1980, judgment of the Supreme Court of North Carolina (Pet. App. 1A-2A)[1] is reported at 301 N.C. 527, 273 S.E.2d 453. The September 2, 1980, opinion of the North Carolina Court of Appeals (Pet. App. 5A-16A) is reported at 48

[1] References to the Appendices to the Petition for a Writ Of Certiorari will be made by "Pet. App." followed by the page number.

N.C. App. 508, 269 S.E.2d 688. The April 11, 1979, order of the North Carolina trial court (Pet. App. 19A-28A) is not reported. The November 22, 1978, Order of the Indiana trial court in a related case (Pet. App. 31A-41A) now on appeal by the NCGA to the Court of Appeals of Indiana is not reported.

JURISDICTION OF THE SUPREME COURT

The judgment of the North Carolina Supreme Court was entered on December 4, 1980 (Pet. App. 1A). The petition for certiorari was filed on March 3, 1981, and was granted on May 18, 1981. The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article IV, Section 1, United States Constitution:

> "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

Article I, Section 8, Clause 3, United States Constitution:

> "The Congress shall have Power***;
>
> "To regulate Commerce***among the several States,***;"

28 U.S.C. § 1738:

> "The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

"The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

"Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken. June 25, 1948, c. 646, 62 Stat. 947."

State Statutes

Pet. App. 42A-45A includes relevant portions of the insurance laws of Indiana and North Carolina. Those are Ind. Code §§ 27-1-4-1, 27-1-4-2, 27-1-4-9 and 27-1-4-10 (now repealed)[2] dealing with rehabilitation of insolvent insurers, and N.C. Gen Stat. § 58-155.69(6), a part of the statute pursuant to which the NCGA was created. The Appendix to the Respondents' Brief In Opposition contains additional portions of the insurance laws of North Carolina dealing with deposits, insolvency proceedings and the powers and duties of the NCGA.

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[2] The old rehabilitation, liquidation and conservation chapter of the Indiana Insurance Law, of which the cited sections were a part, was repealed by the 1979 Indiana General Assembly, Public Law 255. It was replaced by the new Ind. Code §§ 27-9-1-1 *et seq.*, effective September 1, 1979. The UNAC rehabilitation proceeding was governed by the old statute, which in these respects is not significantly different from the new statute.

STATEMENT OF THE CASE

The Parties. The petitioner, UNAC, is an Indiana stock insurance company. Until August 5, 1974, it was licensed to do business in 45 states, including North Carolina. In 1973 UNAC had deposited a bond with the North Carolina Insurance Commissioner in the face amount of $100,000 for the benefit of North Carolina policyholders (J.A. 7-12; R. 35, Ex. Bd. 345[3]). This was required by the North Carolina Commissioner of Insurance in order to maintain UNAC's license to do business in that state. The bond has remained in North Carolina ever since (R. 37, 24).

The respondent NCGA is a creature of North Carolina statute. A guaranty association—a relatively recent development in most states—is a mechanism whereby all insurance companies doing business in a given state become ultimately responsible to fulfill policy obligations of any of them that becomes insolvent or otherwise fails to honor its policies. As explained below, UNAC's rehabilitation reduced UNAC's liabilities on its insurance policies as originally written. As a result, the NCGA became contingently liable to complete those obligations to North Carolina policyholders.

The other two respondents are state officials of North Carolina. They were named as defendants in the North Carolina lawsuit, but UNAC submits they have no interest in this dispute except as stakeholders of UNAC's deposit.

The Indiana Rehabilitation Proceeding (1974-1977). On August 5, 1974, at the request of the Indiana Department of Insurance pursuant to the Indiana Insurance Law,[4] UNAC

[3] References to the Record and to the separately paginated Exhibit Binder from the North Carolina Court of Appeals will be made by "R." or "Ex. Bd." followed by the page number. The Exhibit Binder contains the numerous exhibits attached to five affidavits filed in the North Carolina trial court as a part of that court's summary judgment proceedings. The texts of the affidavits are in the Record itself. When referring to a particular exhibit, UNAC will cite to the page of the Record where the affidavit begins, followed by the page of the Exhibit Binder where the exhibit begins.

[4] Ind. Code §§ 27-1-4-1 and 2 (Pet. App. 42A-44A).

became the subject of an Order of Rehabilitation (J.A. 13) in a statutory rehabilitation proceeding in an Indiana state court ("Indiana Rehabilitation Court" or "Indiana Court"). In oversimplified terms, UNAC's reserves were believed inadequate to meet its future policy obligations (J.A. 17, 46-47). The Indiana Insurance Commissioner was appointed "Rehabilitator" by the Indiana Court as the Indiana statute required. Notice of this action was immediately given to all state insurance commissioners, including the North Carolina Commissioner, who in turn advised the NCGA by letter dated the next day (R. 23, Ex. Bd. 24). Although at this stage it was not a party to the Indiana rehabilitation proceeding, the NCGA was kept abreast of developments in the proceeding (R. 23, Ex. Bd. 24-26; R. 30, Ex. Bd. 59). From August 5, 1974, until February 4, 1977, when UNAC was released from rehabilitation, by the terms of the Indiana statute and the Order of Rehabilitation, the Indiana Commissioner as Rehabilitator had "possession of the property" and was to "conduct the business" of UNAC including the administration of UNAC's over 50,000 outstanding policies scattered around the United States and several foreign countries.

Under the Indiana Insurance Law,[5] the Rehabilitator also had the obligation to take steps, with Court approval, toward the "removal of the causes" of the insolvency or to liquidate the company. That general mandate to the Insurance Commissioner is found in the insurance insolvency statutes of virtually all states. UNAC's policies were in large part disability income insurance policies (treated as a species of life insurance under the laws of Indiana and most other states) in which the insureds were high income professionals including a large block of airline pilots. In view of this rather unusual portfolio, it was likely many insureds might find it difficult or impossible to obtain insurance coverage elsewhere. As a result, the Indiana Commissioner concluded

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[5] Ind. Code § 27-1-4-2(a) (Pet. App. 43A).

that rehabilitation rather than liquidation was desirable. UNAC's policies were unusual in two other respects apart from the character of the policyholder group. First, most policies were "noncancellable," *i.e.*, they were renewable under the same terms, including the amount of the premium, regardless of experience. Second, many had a "return of premium rider" ("RPR") whereby the policyholder was entitled to a refund of 80% of the premiums paid if no disability claims were asserted in a ten-year period.

Work commenced on a "Plan of Rehabilitation"—in substance, a restructuring of UNAC's liabilities very similar to a reorganization of a general business corporation under federal bankruptcy laws. Ultimately, a Plan of Rehabilitation ("Plan") was entered as a part of a judgment ("Final Judgment") of the Indiana Rehabilitation Court (J.A. 37).[6] The essence of the Plan included (a) elimination of RPR benefits and (b) converting the noncancellable policies to "guaranteed renewable," *i.e.*, the policy was renewable at the policyholder's option but the company could increase the premium. The policies were converted to participating policies to return to the policyholders any profits from increased premiums.New management was installed and UNAC's shares were placed in a voting trust under Court appointees, with the requirement that the company be mutualized if certain financial commitments to policyholders were not met within ten years. UNAC was released from rehabilitation on February 4, 1977 (J.A. 120).

The policyholders of UNAC were subject to the jurisdiction of the rehabilitation proceeding in two respects. First, as creditors of (and contracting parties with) UNAC, their rights were subject to adjustment by a plan of rehabilitation.

[6] The Plan as issued on November 22, 1976, was amended in certain minor respects not relevant here, prior to final printing and mailing of the Final Judgment and Plan to interested parties in June of 1977. The Joint Appendix, pp. 37-81, contains the Indiana Court's Final Judgment, its memorandum and the Plan, but does not contain the voting trust (R. 30, Ex. Bd. 236-45) also approved by the Indiana Court.

Second, the policyholders as a class had sued UNAC in multiple forums. Shortly after UNAC was placed in rehabilitation, the Indiana Rehabilitation Court ordered that all claims be prosecuted in that Court. Several actions were stayed by the state and federal courts in which they were pending. The named plaintiffs in two of those suits (originally filed in federal district court in Virginia and state court in Illinois) intervened in the UNAC rehabilitation proceeding. *See generally*, J.A. 15-16, 47-48, and 77-80.

Indiana trial court rules are the same as the Federal Rules of Civil Procedure as they relate to class actions. In 1975 the Indiana Rehabilitation Court conditionally certified all intervening named plaintiffs as class representatives of all UNAC policyholders. A notice (J.A. 15) pursuant to Indiana Trial Rule 23(C) was sent to all policyholders (R. 30, Ex. Bd. 106). It advised them, among other matters, that:

> "The named representatives of the policyholder class, all airline pilots who are holders of disability income policies, initially brought two independent class actions against UNAC. *Schultz v. UNAC* was filed on August 2, 1974, in the Circuit Court of Cook County, Chicago, Illinois, and was subsequently removed to the United States District Court for the Northern District of Illinois. *Honeycutt, et al. v. UNAC* was filed on August 8, 1974, in the United States District Court for the Eastern District of Virginia. The complaints in those actions alleged that UNAC had misled the named policyholder representatives and other members of the class as to the overall economic conditions of the corporation and as to the extent these policies were actuarially sound. They further alleged that these misrepresentations were accomplished, among other means, by a vigorous advertising campaign and through letters to individual policyholders and that, as a result, the company was unjustly enriched. Both of these actions (along with other

litigation based on the same or similar claims) have been stayed by order of the judge in the rehabilitation proceeding. The named class representatives thereafter filed petitions to intervene on behalf of themselves and the class in these rehabilitation proceedings. They have been conditionally determined to represent as intervenors, the class of all UNAC present and former policyholders.

"Any judgment whether favorable or not which may be entered in this action will be binding upon each member of the intervening class who does not request exclusion pursuant to Rule 23(b)(3). Any class member who wishes to be excluded from the class may do so by filing with the Clerk of the Superior Court of Marion County, Room No. 5, Indianapolis, Indiana, a written request for exclusion which must be received by the Clerk on or before January 15, 1976. Any person so requesting exclusion will not participate in any recovery on behalf of the intervening class, and will not be bound by the results of the litigation, insofar as his status as a member of such class is concerned. *As a policyholder, however, he may be bound by a judgment affecting policyholders, if any is entered, including any reorganization plan approved by the Court in the rehabilitation proceeding.* Any policyholder, whether or not he requests exclusion, may as he desires, enter an appearance through his own counsel. Each member of the class not requesting exclusion, whether or not he enters such an appearance will be bound by any judgment in this proceeding." (Emphasis supplied.)

In 1976, a proposed plan was developed after elaborate actuarial analyses of UNAC's unusual portfolio of policies (R. 30, Ex. Bd. 71). Additional groups with potential or actual claims against UNAC, including state guaranty associations

and their insurance commissioners, were given notice of the then current version of the Indiana Insurance Commissioner's proposed plan of rehabilitation. Many groups (agents, creditors, policyholders, shareholders) had already intervened as parties to the rehabilitation proceeding and had participated in the multilateral negotiation that produced the proposed plan. More entered the proceedings after the proposed plan was published. In particular, among many others, the NCGA intervened on June 8, 1976 (R. 30, Ex. Bd. 98). Prior to that time, the NCGA with other affected state guaranty associations[7] had already entered into negotiations with the Rehabilitator as to the terms of the plan that related to guaranty associations.

After those extensive negotiations, modifications to the proposed plan were agreed to by the guaranty associations and the Indiana Insurance Commissioner as Rehabilitator of UNAC (R. 30, Ex. Bd. 103-05) and were incorporated into the Rehabilitator's proposed plan. The proposed plan was approved by the Indiana Rehabilitation Court for distribution to the policyholders on July 19, 1976, after a hearing at which the NCGA was present and participated (R. 30, Ex. Bd. 114). In August, 1976, the Rehabilitator mailed detailed information about the status of the rehabilitation proceeding to all interested persons, including policyholders and the NCGA (R. 30, Ex. Bd. 136-88). The North Carolina Insurance Commissioner and all other affected commissioners were also sent copies. The mailing included (a) a detailed notice of a final hearing scheduled for October 14, 1976 (J.A. 21-25), (b) a copy of a tentative rehabilitation plan for UNAC (R. 30, Ex. Bd. 175, 117-32), with appropriate cover letters to the various groups, and (c) in the case of policyholders, a data sheet describing the policyholder's policy and the amounts the

[7] Only eight state guaranty associations were affected by UNAC's rehabilitation. Several states had no guaranty association at the time. Other state guaranty associations were not involved because the particular types of insurance UNAC wrote—principally professional disability insurance—were not subject to their guaranty association laws.

policyholder would receive under the tentative plan. Anyone desiring to object to any aspect of the plan was advised as to the procedure to be followed (J.A. 23). The notice and the tentative plan specifically stated that all claims against UNAC would be compromised and settled if the Indiana Court approved that plan after the hearing. The important features of the tentative plan—elimination of RPR benefits, continued guaranteed renewable insurance coverage, possible mutualization and potential recovery from former management—affected all disability income policyholders in the same manner. Submission of the plan to appropriate authorities in the United Kingdom and Canada was contemplated (R. 30, Ex. Bd. 130).

The tentative plan treated all assets of UNAC, wherever held, as general assets of the company. All calculations of assets of UNAC were made based on "statutory" accounting. This is a form of accounting prescribed by state law for insurance companies. Insurance companies are required by the law of every state to file annual financial information with the insurance department of each state in which they do business. These are required to be on a uniform form—called an "annual statement" or "convention blank" in the jargon of the industry—prescribed by the National Association of Insurance Commissioners ("NAIC"). *See, e.g.*, Ind. Code § 27-1-3-13, and N.C. Gen. Stat. § 58-21. Among the requirements of the NAIC form is a separate listing of the insurer's deposits in each state, and an itemized listing of all portfolio securities. Deposits are listed on page 18 of the convention blank under a schedule requiring listing of "all deposits made with any Government, Province, State, District, County, Municipality, Corporation, firm or individual***." These same assets are also listed by type of asset. As a result, the North Carolina bond involved here was also included in the convention blank on the schedule entitled: "Schedule D Part 1 Showing all BONDS owned December 31 of Current year" (capitalization in original form). The total of these bonds on Schedule D is then included on line 1 of the "assets" column

on page 2 of the form that sets forth the insurer's balance sheet.[8] The net of this is that UNAC's North Carolina deposit—together with all other deposits—was included in all calculations of the company's liquidation value, etc., in the formulation of the proposed plan, just as any other asset of UNAC, and any policyholder eventually electing to receive liquidation value received a check that included his proportionate share of the North Carolina bond along with everything else. The obverse is also true. The deposits in Indiana, Virginia and elsewhere were treated as assets of the company standing behind its reserves for all policyholders including the North Carolina policyholders who elected to remain with the rehabilitated company (Pet. App. 36A).

On October 12, 1976, the NCGA and the seven other guaranty associations filed a pleading entitled "Information to the Court and Petition for Approval of Mailing to Certain Policyholders of UNAC and Approval of Concept of Service Contract Between Guaranty Associations and UNAC" (J.A. 27). The guaranty associations asked the Indiana Rehabilitation Court to approve a form letter to policyholders in the eight guaranty association states and to approve the concept of a post-rehabilitation service contract between UNAC and each of the guaranty associations. The guaranty associations' request was granted by the Indiana Rehabilitation Court (R. 30, Ex. Bd. 271).

After a hearing on October 14, 1976, at which the NCGA was present and participated, the Indiana Rehabilitation Court issued its Final Judgment, which included the final Plan, on November 22, 1976 (J.A. 37). The Plan was substantially the same as the tentative plan except that (a) certain creditors were ordered to be paid notwithstanding the

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[8] Pages 2 and 18 of UNAC's 1974 annual statement filed with the North Carolina Insurance Commissioner were among the items specifically given to the NCGA by the North Carolina Commissioner in March of 1975 when he "activated" the NCGA (R. 23, Ex. Bd. 26).

Rehabilitator's proposal to the contrary, (b) changes were made in the mechanism for ultimate control of the board of directors of the company, and (c) the Plan contemplated implementation as to United States policyholders even though the ultimate outcome as to policyholders and assets in the United Kingdom and Canada was not yet resolved. A letter (J.A. 83) from the Indiana Insurance Commissioner in December, 1976, to all policyholders advised them of these modifications. A copy went to all state insurance commissioners and others (R. 30, Ex. Bd. 246). The Final Judgment and the Plan acknowledged that amounts held outside the United States might not be able to be recovered and included a calculation that assumed that those assets might be applied only to United Kingdom and Canadian policyholders (J.A. 41, 77). Canada ultimately accepted the Plan after a proceeding in Canadian courts to bind Canadian policyholders as a matter of Canadian law, but the United Kingdom situation remains unresolved (J.A. 112-15).

The Plan effected substantial changes in UNAC's contractual relationships with its policyholders, agents and creditors, and required UNAC's common stock to be placed in a voting trust (R. 30, Ex. Bd. 236-45) whose trustees were appointed by the Indiana Rehabilitation Court. Policyholders were given the option of receiving the liquidated value of their policies or continuing their policies with UNAC with reduced benefits and at increased premiums. The Final Judgment and the Plan, among many other items (a) expressly found that the Indiana Court had jurisdiction over all policyholders and their respective guaranty associations (J.A. 38), (b) compromised each policyholder's claims against UNAC whether or not the policyholder was a member of a Rule 23 certified class (as all North Carolina policyholders were) (J.A. 38-40, 77-81), (c) provided that after the specified Court directed changes in the obligations between UNAC and each of the guaranty associations, "UNAC shall have no further obligation or liability to any guaranty association" (J.A. 73-74), and (d) provided that the Indiana Court would retain

continuing jurisdiction to deal with the interpretation, implementation and necessary future modification of the Plan (J.A. 42-43). No appeal was taken from the Indiana Rehabilitation Court's 1976 Final Judgment.

In June of 1977, the last mass mailing to policyholders, shareholders, insurance commissioners, agents and others was made (R. 30, Ex. Bd. 292). That mailing included the Indiana Rehabilitation Court's Final Judgment and Plan. UNAC has now implemented the Plan in all states of the United States and in Canada and has resumed possession of its property and the conduct of its business as a privately operated Indiana stock insurance company. UNAC is not (and was not at any time after February 4, 1977, when the rehabilitation proceeding terminated) in default of any policyholder contracts as those contracts were revised by the Indiana Rehabilitation Court (Pet. App. 37A).

The NCGA's Post-Rehabilitation Petition (June 1977). On June 8, 1977, UNAC and the eight guaranty associations, including the NCGA, filed in the Indiana Rehabilitation Court a "Petition for Instructions Concerning a Service Contract Between Underwriters National Assurance Company and Each of the State Insurance Guaranty Associations" (J.A. 89). By their joint petition, UNAC and the guaranty associations asked the Indiana Court for permission to execute a Service Contract in the form attached to the petition. On June 14, 1977, the Indiana Rehabilitation Court directed UNAC and each of the guaranty associations to execute and carry out the form Service Contract (R. 30, Ex. Bd. 291). Basically, the Service Contract provided for UNAC to continue to administer the insurance policies of policyholders residing in guaranty association states and to receive a service fee for doing so. The guaranty associations (rather than the policyholders) were to pay UNAC any future premium increases. The guaranty associations were to pay directly to policyholders any policy benefits, such as RPRs, which were cancelled by the Plan.

The North Carolina Lawsuit (January 1978). The other seven guaranty associations abided by the Indiana Rehabilitation Court's Order of June 14, 1977, approving the form Service Contract. In October 1977 the NCGA submitted for UNAC's signature a copy of the form of Service Contract (which it had itself petitioned the Indiana Rehabilitation Court to approve) signed by the NCGA but altered to add a new paragraph on the last page which said rights in the deposit would be governed by North Carolina law. (R. 23, Ex. Bd. 34; R. 36). UNAC responded (R. 23, Ex. Bd. 35) in the following terms:

> "Enclosed is a signed copy of the Service Agreement between Underwriters National Assurance Company and North Carolina Life and Health Insurance Guaranty Association. As you know, this agreement is entered into pursuant to the Plan of Rehabilitation of UNAC that has been approved by the Indiana courts.
>
> "The purpose of this letter is to set forth UNAC's understanding that the last paragraph in the form of agreement beginning 'It is expressly agreed, however,' is designed simply to recite that neither the Guaranty Association nor UNAC has waived any claims that it may have in connection with the North Carolina deposits. You should understand that UNAC takes the position that the Guaranty Association has no claims to the deposits. In particular, UNAC's Plan of Rehabilitation had the effect of shutting off rights that North Carolina citizens and/or the Guaranty Association might otherwise have had to the deposits. That Plan has been approved by the Indiana courts and, as a matter of full faith and credit under the federal constitution, is now binding under North Carolina law as well. Please advise us if the Guaranty Association has any different view. As we understand it, the last paragraph was inserted by

> the Guaranty Association simply to preserve whatever rights it may have had after the implementation of the Plan, and we have executed the enclosed agreement and returned it to you with that understanding.
>
> "Thank you for your cooperation."

The NCGA then filed this case in January of 1978 in a North Carolina state court naming UNAC and the North Carolina Insurance Commissioner and Treasurer as defendants. The complaint (J.A. 99) sought to obtain for the benefit of the NCGA, as claimed assignee of the rights of North Carolina policyholders, the $100,000 deposit made by UNAC in North Carolina in 1973. The North Carolina Insurance Commissioner and Treasurer, though nominal defendants in the lawsuit, filed a cross-claim against UNAC seeking the same sort of relief requested by the NCGA (R. 8). UNAC answered and raised its federal constitutional defenses (J.A. 105; R. 12).

The Indiana Petition for Instructions (July 1978). After the North Carolina lawsuit was filed, UNAC was faced with the prospect of having to make payments to the NCGA under the Service Contract at the same time that, in UNAC's view, the NCGA claimed rights to the bond in derogation of the orders of the Indiana Rehabilitation Court and the rights of policyholders outside North Carolina. As a result, UNAC filed a Petition for Instructions with the Indiana Rehabilitation Court on July 13, 1978 (J.A. 111). Notice of the petition and of the Indiana Rehabilitation Court's setting of a hearing was given to the parties to the UNAC rehabilitation proceeding, including the NCGA, and to the North Carolina officials (Pet. App. 37A; J.A. 121-22; R. 30, Ex. Bd. 329). The hearing was held on September 20, 1978, before the Indiana Rehabilitation Court. The issue was the effect of the Plan on the rights of North Carolina policyholders in the deposit. Both the NCGA and UNAC appeared (Pet. App. 32A).

On November 22, 1978, an Order (Pet. App. 31A-41A) was

entered by the Indiana Rehabilitation Court providing, *inter alia:*

> "2. The Court's final Order and the Plan fully adjudicated and determined that the North Carolina deposit was an asset of (and its use was to be determined by) the rehabilitated Underwriters, and any claim existing as of the date of adoption of the Plan against the deposit by the North Carolina Association or by any policyowner or creditor of Underwriters was compromised, settled and dismissed by the final Order and the Plan.
>
> "3. The insertion by the North Carolina Association of the last paragraph on page 8 of the Service Contract was not authorized by the Court and is a violation of the Court's Order of June 14, 1977. Any attempt by the North Carolina Association or any other person to circumvent the provisions of the final Order, the Plan, or other orders of the Court, or to obtain any preference or special right in the assets of Underwriters, as fully adjudicated by the final Order and the Plan, is a violation of the orders of this Court to be dealt with by the Court."

That Order has been appealed by the NCGA to the Court of Appeals of Indiana. The case is fully briefed, but no appellate decision has as yet been rendered and a stay has now been entered pending disposition of this case by this Court.

Proceedings in the North Carolina Courts (1978-1980.) After the Indiana Rehabilitation Court had thus spoken a second time on the subject of UNAC's North Carolina deposit, the NCGA and the North Carolina Insurance Commissioner and Treasurer joined in a motion for summary judgment in the North Carolina state court action (J.A. 123). UNAC filed a cross motion for summary judgment (J.A. 127). North Carolina procedure with respect to summary judgment motions is the same as that provided by Rule 56 of the Federal

Rules of Civil Procedure. Affidavits and briefs were submitted by both sides and a hearing was held in the North Carolina state court on March 19, 1979. UNAC raised its *res judicata* and full faith and credit defenses in its answer to the North Carolina complaint and cross-claim, and also affirmatively asserted those defenses in support of its motion for summary judgment (Ex. Bd. 394-448).

There were no disputed factual issues presented by the cross-motions. The entire record consisted of the affidavits submitted with respect to the motions. No one suggested in the trial court that the North Carolina officials had any beneficial interest in the deposit. The officials' answer and cross-claim (R. 8) against UNAC affirmatively alleged that the deposit was held "for the sole protection of North Carolina contract holders and policyholders." The only relief requested by the officials was that the North Carolina Commissioner be designated liquidator if the deposit was to be liquidated.

On April 11, 1979, the North Carolina trial court entered summary judgment for the NCGA (Pet. App. 19A). That order held that despite the contrary rulings of the Indiana Rehabilitation Court in 1976 and 1978, UNAC's North Carolina deposit could be applied to meet pre-rehabilitation obligations of UNAC to North Carolina policyholders (Pet. App. 26A-27A).

UNAC appealed to the North Carolina Court of Appeals, raising again its constitutional and statutory defenses. In an opinion dated September 2, 1980 (Pet. App. 5A), the Court of Appeals affirmed the decision of the North Carolina trial court. The North Carolina Court of Appeals held that the Indiana Rehabilitation Court did not have the necessary personal jurisdiction over the North Carolina Insurance Commissioner and Treasurer to adjudicate this deposit, and that since UNAC did not hold title to the deposit, it was not an asset of the company subject to the Indiana rehabilitation proceeding.

On October 6, 1980, UNAC timely filed a Notice of Appeal and Alternative Petition for Discretionary Review in the Supreme Court of North Carolina, raising again its constitutional and statutory defenses, as well as pointing out the interstate commerce implications of the North Carolina Court of Appeals' interpretation of North Carolina law. By judgment entered on December 4, 1980 (Pet. App. 1A), the North Carolina Supreme Court let the opinion of the North Carolina Court of Appeals stand.

SUMMARY OF ARGUMENT

1. *The Plan Barred All Pre-Rehabilitation Claims.* It is clear that the Final Judgment and Plan entered by the Indiana Rehabilitation Court in 1976 intended to "compromise and settle" the rights of all policyholders against UNAC (J.A. 38-42, 62, 80-81). It is equally clear that all policyholders were told that this would be the result in the 1975 rehabilitation and class action notice (J.A. 16-17), in the 1976 notice of hearing (J.A. 24-25), in the late 1976 mailings from the Indiana Insurance Commissioner and policyholder class counsel (J.A. 83-87), and in the June, 1977, mailing of the text of the Indiana Rehabilitation Court's Final Judgment and Plan. Each North Carolina policyholder elected to continue coverage under his policy and each paid his premiums and received benefits from UNAC since 1976 in accordance with the policy. In view of the multiple mailings and hearings and the abundant information given to all interested persons, the procedural due process rights of policyholders and others were fully protected.

2. *The Rehabilitation Court Had Jurisdiction to Bar All Policyholders' Claims.* The Indiana Rehabilitation Court had jurisdiction over the subject matter by virtue of its being a trial court of general jurisdiction to which the Indiana legislature granted jurisdiction to rehabilitate insolvent Indiana insurance companies. It also had three separate bases of jurisdiction to adjudicate the claims of the policyholders against UNAC whether that jurisdiction is viewed as *"in*

personam," "*in rem*" or something else. First, it had jurisdiction over the claims of the policyholders because they entered into a contract of insurance with an Indiana insurance company that included, as a matter of law, a consent to an Indiana rehabilitation action in the event of the insurer's insolvency. The Indiana Court also had *in rem* jurisdiction over all claims by and against UNAC—as opposed to the assets that might satisfy those claims—under well settled principles that entitled the Court to adjudicate those claims. Third, the North Carolina policyholders, by their representatives, were plaintiffs in the Indiana Rehabilitation Court. They were given notice of their representation and failed to "opt out." They also were given a notice of the Plan as a proposed settlement of their claim and an opportunity to be heard. And they in fact received and continue to receive the benefits of the Plan. Under these circumstances they are bound by the Plan under class action doctrines.

3. *The North Carolina Officials Make No Difference.* The North Carolina officials have no interest in the deposit except to see that it is maintained in the state, as it is, to secure any future breach of UNAC's obligations to policyholders. There is no present breach and the officers have no claim. As a result, their absence as parties from the Indiana proceeding is irrelevant. Moreover, they could not be required to appear in the Indiana action, and declined an invitation to appear voluntarily. They received notice of the Indiana proceeding and that is enough. Any doctrine of North Carolina law that precludes adjudicating the rights of the policyholders *viz a viz* UNAC in a court of a sister state is an unconstitutional burden on interstate commerce.

4. *The NCGA is Barred From Relitigating Any Aspect of This Suit.* The NCGA is the only North Carolina party with any interest in the outcome of this suit. If the deposit can be seized for its benefit, the NCGA gains; if not, its obligations to the North Carolina policyholders—and the policyholders' rights

to their policy benefits—are unaffected. The policyholders simply have no interest in the resolution of this dispute. Any claim NCGA may have to the deposit is solely by assignment of or subrogation to the rights of the North Carolina policyholders whose policies it guarantees. When the Indiana Rehabilitation Court entered its 1976 Final Judgment and released UNAC from rehabilitation, that order fixed the rights and obligations of UNAC, the policyholders and the NCGA. The policyholders are bound by the Plan and UNAC is not in default of any current obligations to them. As a result, they have no claim against UNAC's deposit. Because the policyholders have no claim, the NCGA has no claim. Finally, the NCGA was a party to both the 1976 and the 1978 Indiana proceedings, and it is bound by the result of both. As such, it cannot relitigate either the Plan or the question whether it and/or the policyholders are bound by the Plan. Both the 1976 Plan and the 1978 Order of the Indiana Court are given *res judicata* effect in Indiana and, therefore, are entitled to full faith and credit in the courts of North Carolina. Accordingly, when faced with the cross motions of UNAC and the NCGA for summary judgment on the undisputed facts, the North Carolina courts were obliged to enter judgment for UNAC.

ARGUMENT

I.

THE INDIANA REHABILITATION COURT HAD JURISDICTION TO ALTER THE POLICYHOLDERS' RIGHTS AGAINST UNAC

A. Fundamental Policy And Established Insurance Doctrine Support Jurisdiction

This case involves an insurance company reorganization. The Bankruptcy Code does not apply to insurance companies. 11 U.S.C. § 109(b). Rather, the problems of insolvent insurers are relegated to state law, which has long regarded insurance as of particular public concern subject to unusual if not

unique doctrines.[9] Because of the complexities involved in insurance policies insurance accounting, and the actuarial considerations they entail, for better or worse, state insurance commissioners have been vested with the duty and authority to protect the policyholders' interests. In contrast to the reliance on full disclosure that underlies the securities laws and many consumer laws, state legislatures have generally elected to give the insurance commissioners broad discretion to take appropriate steps to protect the interests of the policyholders as a group, particularly in the event of an insurance company's insolvency. It is well settled that:

> "***[T]he power of the insurance commissioner with respect to statutory proceedings against insolvent or delinquent insurers is of general public concern, and contract and property rights must yield thereto."

2 *Couch On Insurance 2d* § 22:16, at 681 (1959). *In accord, Caminetti v. Pacific Mutual Life Insurance Co. of Cal.*, 22 Cal.2d 344, 139 P.2d 908, 917 (1943). In most opinions concerning rehabilitation proceedings, there are similar statements to the effect that the insurance industry so affects the public interest that the state has the power to regulate the industry and provide for rehabilitative measures through the insurance commissioner under the police power. *See e.g., Bolton v. Progressive General Insurance Co.*, 85 Ill.App.2d 427, 229 N.E.2d 350, 351 (1967); *Kueckelhan v. Federal Old Line Insurance Co.*, 69 Wash.2d 392, 418 P.2d 443, 452 (1966); and *Dirks v. Capitol Security Life Insurance Co.*, 84 S.D.595, 174 N.W.2d 212, 213 (1970). As a corollary, the insurance commissioner has broad discretion in devising a plan of rehabilitation:

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[9] *California State Auto. Association Inter-Ins. Bureau v. Maloney*, 341 U.S. 105 (1951). As noted in footnote 2, 341 U.S. at 109, state regulation of insurance has withstood due process challenges in a wide variety of contexts over the years. *See also* the McCarran-Ferguson Insurance Regulation Act, 15 U.S.C. §§ 1011-1015, in which the Congress explicitly deferred to state regulation of the business of insurance.

> "The primary duty impressed by the statute upon the Commissioner in a rehabilitation proceeding is to correct or remove the causes and conditions which have made the rehabilitation proceeding necessary and, if possible, to conserve and restore the company to a viable status for the benefit of the policyholders. Toward this end he must be afforded that freedom of action in the overall management of the company which will permit him to knowledgeably evaluate, plan, devise, and implement a program which in his best judgment and in keeping with his expertise in the field of insurance will accomplish the objective of the proceeding. ***"

Kueckelhan v. Federal Old Line Insurance Co. (Mut.), 74 Wash.2d 304, 444 P.2d 667, 674 (1968).

The UNAC Plan, complex as it is, evidences an effort by the Indiana Insurance Commissioner to give priority to the interests of the policyholders as a group with primary emphasis on providing continued insurance coverage for those who need it. One essential element of any reorganization of an impaired business entity—insurer or not—is that the plan be given finality in order that the revived entity knows where it stands. Attainment of that objective is plainly an appropriate objective of an insurance commissioner who inherits a failing insurer. Consequently, numerous decisions in this Court and in the state courts recognize the power of a court-approved plan to adjust all types of claims against the insurer. *See, e.g., Neblett v. Carpenter*, 305 U.S. 297 (1938), *affirming Carpenter v. Pacific Mutual Life Ins. Co. of Cal.*, 10 Cal.2d 307, 74 P.2d 761 (1937) (policyholders); *In re American Investors Assurance Co.*, 521 P.2d 560 (Utah 1974) (shareholders); *People v. Peoria Life Ins. Co.*, 376 Ill. 517, 34 N.E. 829, *cert. denied*, 314 U.S. 688 (1941) (agents).[10]

[10] *See also Liberty Nat'l Ins. Co. v. Reinsurance Agency, Inc.*, 307 F.2d 164

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Some of the policy considerations in support of state court jurisdiction noted by this Court in *World-Wide Volkswagen Corp. v. Woodson*, ____ U.S. ____, 100 S.Ct. 559 (1980), are particularly persuasive here. The forum state (Indiana) has a very strong interest in adjudicating claims against an insolvent insurer because its own state officials are charged with trying to clean up the mess. *Cf. Feldman v. Bates Manufacturing Co.*, 143 N.J. Super. 84, 362 A.2d 1177 (1976) (action to compel a corporation with shareholders in many states to convert its preferred shares to common is proper only in the state of incorporation which has the greatest interest). The interest of judicial efficiency in dealing with the affairs of an insolvent multistate insurer also strongly supports jurisdiction in the state of domicile. *Cf. World-Wide Volkswagen, supra*, 100 S. Ct. at 564; Fraser, *Jurisdiction By Necessity—An Analysis Of The Mullane Case*, 100 U. Pa. L. Rev. 305 (1951). And, in the terms used by this Court in *Shaffer v. Heitner*, 433 U.S. 186 (1977), and *Kulko v. Superior Court*, 436 U.S. 84 (1978), every policyholder had every reason to expect to be "haled into court" in Indiana in the event UNAC became insolvent. Indeed, that is precisely what Indiana law and standard insurance doctrine prescribe: the domiciliary state is responsible for dealing with an insurer's financial difficulties. 2 *Couch On Insurance 2d* §§ 22:10 and 22:11 (1959); 19 Appleman, *Insurance Law And Practice* § 11001 (1946), and § 11031 (1979 Supp.). Moreover, there is no other court that could entertain all claims by and against UNAC. This consideration strongly supports jurisdiction of the Indiana court. Von Mehren & Trautman, *Jurisdiction To Adjudicate: A Suggested Analysis*, 79 Harv. L. Rev. 1121, 1162 (1966). And the jurisdiction asserted is, solely to adjudicate

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(9th Cir. 1962); *National Surety Corp. v. Nantz*, 262 Ky. 413, 90 S.W.2d 385 (1936); *Hutchins v. Pacific Mut. Life Ins. Co. of Cal.*, 97 F.2d 58 (9th Cir. 1938); *Morris v. Investment Life Ins. Co. of America*, 1 Ohio App.2d 330, 204 N.E.2d 550 (1965); *Neblett v. Pacific Mut. Life Ins. Co. of Cal.*, 22 Cal.2d 393, 139 P.2d 934 (1943), *cert. denied*, 320 U.S. 802 (1944).

rights arising from the policyholders relationship to the insurance company; no general jurisdiction over the policyholders is claimed.

Under these circumstances, the issue presented is whether the Indiana Rehabilitation Court had the power to adjust the rights of North Carolina policyholders even as to claims they may have asserted—but did not assert prior to the Final Judgment and Plan—against a deposit in that state. UNAC submits that there were three separate bases for that power in the Indiana court, any one of which was sufficient.

B. The Policyholders As Such Are Subject To The Indiana Rehabilitation Court's Jurisdiction

Every policyholder entered into a contract with UNAC. UNAC, as an Indiana insurer, carries with it in each state in which it does business, the Indiana Insurance law, the provisions of which provide for rehabilitation by the Indiana Commissioner in an Indiana court (Pet. App. 42A-45A). That notion is reflected in decisions of this Court of over 100 years standing.[11] It can be viewed as "consent" as a matter of law,[12] or as jurisdiction by representation or simply as a matter of "jurisdiction by necessity."[13] It is grounded in the very practical point that if the state of domicile cannot bind all policyholders, there is no realistic means of rehabilitating an insolvent insurer. And there is nothing "unfair" about requiring all creditors of an insolvent insurer to submit to the

[11] *Relfe v. Rundle*, 103 U.S. 222 (1880); *Order of United Commercial Travelers v. Wolfe*, 331 U.S. 586 (1947). *In accord*, 19 Appleman, *Insurance Law And Practice* § 11001, at 570 (1946).

[12] Similarly, courts of the state of domicile of a mutual assessment association or corporation have jurisdiction to assess the members or shareholders in other states and this Court has required courts in non-domiciliary states to give full faith and credit to decisions made by courts in the state of domicile. *See, e.g., Bernheimer v. Converse*, 206 U.S. 516 (1907); *Supreme Council of Royal Arcanum v. Green*, 237 U.S. 531 (1915); *Hartford Life Ins. Co. v. Ibs*, 237 U.S. 662 (1915); *Hartford Life Ins. Co. v. Barber*, 245 U.S. 146 (1917).

[13] Fraser, *Jurisdiction By Necessity—An Analysis of the Mullane Case*, 100 U. Pa. L. Rev. 305 (1951), cited with apparent approval in *Hanson v. Denckla*, 357 U.S. 235, at 246 n. 13 (1958).

jurisdiction of a single court; indeed, it is fundamentally unfair to deny the insurer and its creditors a unified forum in which to attempt to work the matter out.

As put by the Eighth Circuit in affirming the dismissal of a Missouri suit against an insurer in liquidation in New York:

> "* * * Experience has demonstrated that, in order to secure an economical, efficient, and orderly liquidation and distribution of the assets of an insolvent corporation for the benefit of all creditors and stockholders, it is essential that the title, custody, and control of the assets be intrusted to a single management under the supervision of one court. * * *"

Motlow v. Southern Holding & Sec. Corp., 95 F.2d 721, 725 (8th Cir. 1938).

This Court's holding in *Neblett v. Carpenter*, 305 U.S. 297 (1938), sustained a plan very similar to UNAC's against a challenge that it violated the federal constitutional prohibition against state impairment of contracts. However, the Court plainly assumed that the Pacific Mutual plan, if sustained, would be binding on policyholders in other states. Subsequently, courts in several states squarely held the very same plan binding on policyholders outside the state of domicile. Cases specifically rejecting collateral attacks on insurance reorganizations on the basis that the judgment of the rehabilitation court is entitled to full faith and credit include *Taylor v. Pacific Mutual Life Ins. Co. of Cal.*, 214 N.C. 770, 100 S.E.882 (1939); *Larson v. Pacific Mutual Life Ins. Co. of Cal.*, 373 Ill. 614, 27 N.E.2d 458, *cert. denied*, 311 U.S. 698 (1940); *Padway v. Pacific Mutual Life Ins. Co. of Cal.*, 42 F. Supp. 569 (E.D. Wis. 1942).[14]

[14] More generally, federal and state courts and officers must defer to domiciliary state dissolution proceedings and the rights of a statutorily-appointed insolvency receiver in the insolvent company's home state. *See Relfe v. Rundle*, 103 U.S. 222 (1880); *Converse v. Hamilton*, 224 U.S. 243

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This is not to say that the Indiana Rehabilitation Court can or should ignore claims based on deposits in other states. To the contrary, if a North Carolina policyholder had sought to seize the deposit before UNAC was released from rehabilitation, that presumably could have been done, if not in North Carolina, in the Indiana Rehabilitation Court itself. Of course, an offsetting adjustment would have been made by the Plan to eliminate the North Carolina policyholders' rights in non-North Carolina assets, just as provision was in fact made for the contingency that policyholders or assets in Canada or the United Kingdom—where the Plan was not entitled to full faith and credit—might not be bound by the Plan. But no effort was made before the Plan was adopted to set off the North Carolina deposit. As a result, the Plan shut off any future attack based on pre-rehabilitation claims.

An alternative way to express the result that the policyholders are bound is to assert that the Indiana Insurance Commissioner was a "trustee" for all creditors including the policyholders and others. *Larson v. Pacific Mutual Life Insurance Co. of Cal.*, 373 Ill. 614, 27 N.E.2d 458, *cert. denied*, 311 U.S. 698 (1940). This is correct in substance. The rehabilitation is a regulatory proceeding. Because of the inherent complexity of many aspects of insurance, the states have generally elected to rely on a regulatory agency rather than the perceived self interest of those affected. The state legislatures direct the Commissioner to act in what he perceives to be the best interests of the policyholders as a whole. This is certainly a legitimate exercise of state legislative judgment. And viewing the commissioner as the "trustee" of the policyholders is consistent with the need that a binding judgment result even if no policyholder had

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(1912); *Broderick v. Rosner*, 294 U.S. 629 (1935); *Clark v. Willard*, 292 U.S. 112 (1934); *Commonwealth Of Pennsylvania v. Williams*, 294 U.S. 176 (1935); *Penn Gen. Cas. Co. v. Commonwealth*, 294 U.S. 189 (1935). *In accord*, *Genecov v. Wine*, 109 F.2d 265 (8th Cir. 1940); *American Cast Iron Pipe Co. v. Statesman Ins. Co.*, 343 F. Supp. 860 (D. Minn. 1972).

appeared in the proceeding. Given notice and an opportunity to be heard, the trustee's final settlement of his account is binding on all beneficiaries. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

Finally, some courts speak of the *"in rem"* jurisdiction of the court over all claims by and against the insurer. *Hutchins v. Pacific Mutual Life Ins. Co. of Cal.*, 97 F.2d 58 (9th Cir. 1938). This too is consistent with the notion that a rehabilitation plan may be implemented even if no policyholder seeks to intervene.

Regardless of how one rationalizes the result in traditional jurisdictional terms ("consent," "trusteeship," or *"in rem"* jurisdiction) it is clearly correct that the state of domicile has the jurisdiction to adjust contractual rights against the insurer and to make it stick. That was done here, and it is entitled to full faith and credit in all states of the union.

C. The Policyholders, As Members Of A Plaintiff Class, Have Entered Into A Binding Settlement Agreement.

This case involves an insurance rehabilitation proceeding that binds policyholders regardless of the adequacy of representation by other policyholders, and would be binding even if no policyholder appeared as a named party. Representative theories are really irrelevant in a regulatory proceeding of this nature. Note, *Multistate Plaintiff Class Actions: Jurisdiction And Certification*, 92 Harv. L. Rev. 718, 725 (1979). However, because several policyholders did intervene and were certified as class representatives, the policyholders are also bound under traditional class action doctrines. The class was certified as to the claims the policyholders asserted against UNAC in general. These were "common question" claims cognizable under Indiana Trial Rule 23(B)(3) identical to Federal Rule 23(b)(3). Accordingly, a class action notice of the right to opt out was sent. Because each class member of this plaintiff class had the right to "opt out" under Indiana Rule 23, the minimum contacts analysis

appropriate for personal jurisdiction over a defendant is inapplicable. Rather, as set forth in *Shutts v. Phillips Petroleum Co.*, 222 Kan. 527, 567 P.2d 1292 (1977), a state court class action may bind all members of a plaintiff class. At the very minimum that is true where the action results in a settlement that takes the form of an ongoing relationship—in this case insurance coverage—in which each class member has affirmatively elected to participate and has received benefits. *Cf.* Note, *Multistate Class Actions, supra*, at 734.

II.

PROCEDURAL DUE PROCESS WAS OBSERVED

Each policyholder was mailed a notice (J.A. 15) shortly after the class representatives were conditionally certified. The policyholder was told (a) he would be represented in the prosecution of claims against UNAC along with all other policyholders, world-wide, unless he opted out, (b) he could intervene in his own name, and (c) he would be bound by any plan of rehabilitation regardless of whether he opted out, intervened or remained a class member. After the Indiana Insurance Commissioner formulated his proposed plan, a second notice (J.A. 21) was sent, along with the complete text of the Commissioner's proposal (R. 30, Ex. Bd. 175, 117-32). This made clear what the Commissioner proposed to do to the policyholders' contracts and gave notice of the time and place of a hearing and the procedure to be followed by anyone wishing to present anything to the Indiana Rehabilitation Court. A hearing was held and the Plan (J.A. 57), modified in some respects as a result of the hearing, was adopted as a part of the Final Judgment of the Indiana Court (J.A. 37). This too was communicated to the world, first by letters from the Indiana Commissioner and policyholder class counsel (J.A. 83-87), and a few months later by the mailing of the complete text of the Final Judgment and the Plan with explanatory materials (R. 30, Ex. Bd. 292). In the case of North Carolina policyholders, they were told of the NCGA's role. Accordingly, and obviously, no North Carolina policyholder

had any incentive to object because his insurance coverage, as guaranteed by the NCGA, remained essentially intact.

As noted above, the central provisions of the Plan affected all policyholders in the same manner. There were no subclasses certified although it is obvious that to some degree holders of different policies were affected differently by the Plan. However, the same is true of persons of different ages, persons who were no longer (or might no longer be) insurable, etc. Equally true is that policyholders in various states would be in somewhat differing positions if a scramble to liquidate all of UNAC's assets, wherever found, were to ensue. But the Commissioner determined that liquidation was not in the interests of the policyholders as a whole. And that judgment is exactly the sort of judgment the Commissioner is charged by state law with making. The only issue presented to this Court is whether the procedure adopted—notice to all policyholders of the rehabilitation proposals and an opportunity to be heard—is sufficient to meet the due process requirements of the Fourteenth Amendment. The answer to that is obviously affirmative. *See, e.g., Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). Indeed, no one to date has contended otherwise in Indiana, North Carolina or elsewhere. The notices given in the UNAC rehabilitation were far more elaborate than those sustained in *Morris v. Investment Life Ins. Co. of America*, 1 Ohio App.2d 330, 204 N.E.2d 550 (1965), *and Neblett v. Pacific Mutual Life Ins. Co. of Cal.*, 22 Cal.2d 393, 139 P.2d 934 (1943), *cert. denied*, 320 U.S. 802 (1944).

Once notice of the Plan and an opportunity to be heard were given, the constitutional requirements of jurisdiction were met. All subsidiary issues, e.g. how far the Plan is to spell out the precise impact on various subgroups, are simply issues of state procedural law. As to these issues, the 1978 proceeding in Indiana was the NCGA's day in court and that decision of the Indiana Court is itself entitled to full faith and credit. Equally important, no such issue is raised by the decisions below because the North Carolina courts held that Indiana

simply could not make a binding adjudication as to UNAC's rights in the North Carolina deposit regardless of the procedure used. The North Carolina trial court did include a finding (Pet. App. 21A) that no representative policyholder was from a state with a deposit, although it is unclear what significance, if any, the trial court attached to that finding. This finding is unsupported by anything in the record. It is also incorrect. Virginia residents (with Virginia counsel) were among the class representatives in Indiana, and Virginia is among the states with a deposit. Indeed, the specific page from UNAC's 1974 convention blank listing deposits in Indiana, North Carolina and Virginia among others, was called to the NCGA's attention by the North Carolina Commissioner when he activated the NCGA (R. 25; R. 23, Ex. Bd. 26). However, even if there were no intervening policyholder from a depositing state (or no policyholder from any state), the Indiana Insurance Commissioner is to devise a plan in the best interests of the policyholders as a whole which, after notice and a hearing, binds the entire group. All deposits were and are matters of public record, not only in the Indiana Rehabilitation Court, but, as explained above, in filings with every state insurance commissioner.

Finally, any theoretical claim they may have had to the deposit was wholly immaterial to the North Carolina policyholders because the NCGA stood behind UNAC's obligations. The NCGA, an association of 600 insurance companies and a party to the Indiana rehabilitation proceeding, was fully capable of evaluating the Plan's impact on it. Similarly, the North Carolina Insurance Commissioner was advised of UNAC's insolvency from the first days of the rehabilitation proceeding and promptly reported the potential liability to the NCGA (R. 23, Ex. Bd. 24-26). If resort to the North Carolina deposit were desirable[15]—and it is far from

[15] There are a number of reasons why a party with an interest in the North Carolina deposit might choose to give up that interest and participate instead in the rehabilitation in Indiana. First, the cost of administering a

(Footnote continued on following page)

clear that it was—that remedy was available up to the moment the Indiana Rehabilitation Court approved the Plan. *See, e.g., Continental Bank & Trust Co. v. Gold*, 140 F. Supp. 252 (E.D. N.C. 1956). At that moment, it evaporated.

III.
THE NORTH CAROLINA OFFICIALS MAKE NO DIFFERENCE

UNAC submits the the North Carolina officials have no interest in the deposit and for that reason their absence is irrelevant. If, however, North Carolina law seeks to create such an interest under its state law that cannot be compromised by a court of the insurer's domicile, then that effort must fail. It has long been recognized that the courts of one state vested with jurisdiction over the person of disputing claimants to property, can adjudicate that dispute even if the property is outside that state. *Riehle v. Margolies*, 279 U.S. 218 (1929); *Morris v. Jones*, 329 U.S. 545 (1947). That is what happened here. The Indiana Rehabilitation Court, in exercise of its jurisdiction to adjudicate the policyholders' claims against UNAC, did just that in 1976. The same is true of any claims the NCGA had. Then in 1978 the Indiana Court

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separate rehabilitation or liquidation in North Carolina would be substantial. That fact led the Canadian authorities to go along with the Plan, even though UNAC had a disproportionately large amount of assets on deposit in Canada and Canadian policyholders would have fared better than U.S. policyholders in a liquidation. Second, the Plan gave policyholders (and the NCGA as their assignee) certain contingent rights to recoup their losses. Those included an initial cash distribution, a share of a $2.5 million limited RPR benefit, a share in any third-party litigation recoveries, and, for the eight guaranty associations, a share of future profits. Finally, the Plan offered policyholders uninterrupted insurance coverage with UNAC. Whether the $100,000 in North Carolina could economically be run as a separate mini-insurance company insuring the approximately 30 policyholders in that state is problematic at best.

adjudicated that it had already adjudicated the claims of both the policyholders and the NCGA. If the state of North Carolina ever had any interest in the deposit, the North Carolina Insurance Commissioner was given notice of the Indiana rehabilitation proceeding and received copies of all mailings to policyholders including the notice of the proposed plan. After the North Carolina litigation was instituted, both the North Carolina Insurance Commissioner and the Treasurer were given notice of the 1978 hearing in Indiana. At no point was either official made a party to the Indiana proceeding, except to the extent that the notices made them parties, and neither voluntarily appeared. The same is true of the policyholders and creditors insofar as the proceeding was a pure rehabilitation proceeding, disregarding the fact that some policyholders did institute and ultimately compromise a class action.

Nothing more could have been done with regard to the North Carolina officials. The Court's recent opinion in *Leroy v. Great Western United Corp.*, 443 U.S. 173 (1979), did not have to reach the assertion of personal jurisdiction by the trial court in one state (Texas) over government officials responsible for enforcement of the state takeover statute in a second state (Idaho). The Fifth Circuit decision upholding that jurisdiction, *Great Western United Corp. v. Kidwell*, 577 F.2d 1256 (5th Cir. 1978), is questionable on its facts. But even if *Kidwell* is correct on its facts, this Court's opinions in *World-Wide Volkswagen Corp. v. Woodson*, ___ U.S. ___, 100 S.Ct. 559 (1980); *Kulko v. Superior Court*, 436 U.S. 84 (1978), and *Schaffer v. Heitner*, 433 U.S. 186 (1977), and the Court's other personal jurisdiction decisions since *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), make clear that neither official involved in this case could have been compelled to appear in Indiana. *See also, Colorado River Water Cons. District v. Andrus*, 476 F. Supp. 966 (D. Colo. 1979); *Turner v. Baxley*, 354 F. Supp. 963 (D. Vt. 1972); *Idaho Potato Commission v. Washington Potato Commission*, 410 F. Supp. 171 (D. Idaho 1976). Unlike the policyholders, neither official

had taken any action to associate himself with UNAC or otherwise to consent to jurisdiction in an Indiana court. And neither availed himself of any benefit of Indiana law, an essential element according to *World-Wide Volkswagen, supra*. There was nothing to prevent the officials from objecting at the Indiana hearing, however. And, because the North Carolina Insurance Commissioner received the same notices as the policyholders and the same opportunity to be heard, he is equally bound by the Final Judgment and Plan. If that is not the law, then North Carolina's attempt to make its officials indispensable but unreachable parties to any effort to adopt a binding plan of rehabilitation is an unconstitutional burden on the commerce of interstate insurance, which necessarily involves assets and liabilities in many states. *Cf.* Horowitz, *The Commerce Clause As A Limitation On State Choice-Of-Law Doctrine*, 84 Harv. L. Rev. 806 (1971).

IV.

THE NCGA IS BOUND BY THE PLAN IN ANY EVENT

The NCGA is the only North Carolina party with any interest in the deposit. It intervened as a party in the Indiana proceeding in 1976, before the proposed plan was distributed to the policyholders. It negotiated and later advocated changes in the initial proposals by the Indiana Insurance Commissioner. It participated in the hearing at which the Plan in its final form was approved. It petitioned the Indiana Court for approval of the Service Agreement and was ordered to execute the Agreement in the form attached to its petition. It sought and received authority to make a separate mailing to North Carolina policyholders explaining their unusual status in the proceeding by virtue of the NCGA's coverage as to them. In 1978 the NCGA participated in the hearing after which the Indiana Rehabilitation Court held that the Plan was binding on North Carolina policyholders and the NCGA as to the North Carolina deposit. It has appealed that Order and its appeal is pending.

Under these circumstances (a) the NCGA is bound by the Final Judgment and the Plan and (b) the NCGA is bound by the 1978 Order. Both the Plan and the 1978 Order are entitled to full faith and credit in North Carolina. The 1978 Order adversely adjudicated the issues the NCGA sought to assert in the North Carolina courts. If the NCGA wished to challenge the jurisdiction of the Indiana court to enter the Plan as a binding judgment with respect to the North Carolina deposit, the 1978 hearing gave the NCGA a full and fair opportunity to make that contention. As held by this Court in *Durfee v. Duke*, 375 U.S. 106, 111 (1963):

> "However, while it is established that a court in one State, when asked to give effect to the judgment of a court in another State, may constitutionally inquire into the foreign court's jurisdiction to render that judgment, the modern decisions of this Court have carefully delineated the permissible scope of such an inquiry. From these decisions there emerges the general rule that *a judgment is entitled to full faith and credit—even as to questions of jurisdiction—when the second court's inquiry discloses that those questions have been fully and fairly litigated and finally decided in the court which rendered the original judgment.*"

375 U.S. at 111 (Emphasis supplied.) Thus the North Carolina trial court in 1979 was obliged to give full faith and credit to the 1978 decision of the Indiana Rehabilitation Court. *Cf. Baldwin v. Iowa State Traveling Men's Association*, 283 U.S. 522 (1931) (order of one federal district court denying motion to dismiss for lack of personal jurisdiction is *res judicata* as to that issue in subsequent action to enforce the judgment).

The fact that an appeal is pending from the 1978 Order is irrelevant. Both federal and Indiana law hold that a trial court decision is entitled to *res judicata* effect notwithstanding the pendency of an appeal. IB *Moore's Federal Practice* ¶0.416[3] (1974); *In re Estate of Nye*, 157 Ind.

App. 236, 299 N.E.2d 854, 865 n. 22, *pet. for reh. overruled*, 157 Ind. App. 236, 301 N.E.2d 786 (1973). Because 28 U.S.C. § 1738, implementing the full faith and credit provision of the Constitution, requires the judgment to be given the same effect in the forum state (North Carolina) as it receives in the state of origin (Indiana), Indiana *res judicata* law controls. However, North Carolina law is in accord. *Armfeld v. Moore*, 44 N.C. 157 (1852); *Humphrey v. Faison*, 247 N.C. 127, 100 S.E.2d 524 (1957); *King v. Grindstaff*, 284 N.C. 348, 200 S.E.2d 799 (1973). As a result, even if the 1978 Order were incorrect (which it is not), it is *res judicata* and must be followed by the North Carolina courts. *American Express Co. v. Mullins*, 212 U.S. 311, 312 (1909); *Hartford Life Ins. Co. v. Ibs*, 237 U.S. 662 (1915).

The NCGA is the party at whose instance and for whose benefit the North Carolina courts ordered UNAC's deposit liquidated. As the North Carolina Court of Appeals observed, the NCGA "acknowledged its statutory liability to North Carolina UNAC's (sic) policyholders with regard to the increase in guaranteed premiums and the default on the return of premium riders allowed by the Rehabilitation Order" (Pet. App. 15A). Any liquidation of the deposit will benefit solely the NCGA and is in fact contrary to the interests of the North Carolina policyholders to the extent they have any interest because it eliminates the deposit as protection against any future UNAC default.

Under these circumstances, even if the policyholders were not estopped from relitigating the effect of the Plan on the North Carolina deposit, the NCGA (to whom the policyholders have assigned their rights) is so estopped, and UNAC is entitled to summary judgment as a matter of full faith and credit.

CONCLUSION

For the above reasons, UNAC respectfully requests that the decision of the North Carolina Court of Appeals be reversed and that court be directed to enter summary

judgment for UNAC dismissing the NCGA's complaint and the cross-claim of the North Carolina Insurance Commissioner and Treasurer seeking the same relief the NCGA requested.

Respectfully submitted,

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